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SOUTHERN BOUNDARY OF OHIO—REPORT OF THE OHIO COMMISSIONERS. *

[The very great importance of this question has induced us to devote many pages of this journal to its discussion. [See 3 *W. Law Jour.* 310, 337; 4 *W. Law Jour.* 145, 253.] The same reason induces us to lay before our readers the doings of the Commissioners appointed by Ohio and Virginia, to negotiate upon this subject. Not having room for the entire Report, we shall present the substance of it, with as large quotations as we can find room for.

The Commissioners on the part of Ohio were *Thomas Ewing*, *John Brough*, and *James Collier*. The Commissioners on the part of Virginia were *William C. Rives*, *William Green*, and *George W. Thompson*. The Ohio Commissioners were empowered to negotiate both with Virginia and Kentucky; but no Commissioners had been appointed by Kentucky. The Ohio and Virginia Commissioners convened at Washington on the 10th of January, 1848. The powers given to the Ohio Commissioners were, "to enter into a compact with the said Virginia Commissioners, settling the *jurisdiction*, or *boundary*, or *both*, upon that part of the Ohio River which divides the States of Ohio and Virginia." W.]

The negotiations commenced with the five following propositions from the Ohio Commissioners: [I.]

1. That the middle thread of the Ohio river, where there is no island therein, shall be the boundary between the said States; and where there is an island or islands in said river, the middle of the channel on the Ohio side of such island or islands, shall be the boundary.

2. That each State shall have exclusive jurisdiction over all her shore without the banks of said river at all times, and within the banks when the same shall not be covered with the waters of said river.

* "Report of the Commissioners of Ohio, appointed by Resolution, passed Feb. 8th, 1847, to adjust the boundary line, &c., between Ohio and Virginia, made to the Senate of Ohio, Feb. 2, 1848."

3. That each State on its own shore, or the citizens thereof, may extend into the river—but not so far, or in such manner, as to obstruct the navigation thereof—wharves, abutments, locks, slopes, warehouses, mills, and other fixtures; and may attach to the shore or moor thereby, floating wharves, warehouses, and other structures convenient for landing, loading and trade; and may project into the river pipes, pumps, and other machinery for drawing water therefrom, all of which shall be within the exclusive jurisdiction of the State owning the shore; as also shall all boats, vessels, rafts, and other watercraft of every kind attached to, or moored by the shore for the purpose of holding communication therewith.

4. That with the above exceptions, the two States shall have concurrent jurisdiction over and upon the said river within its banks.

5. And the said river, within its banks, so far as it flows between the said States, shall be taken and deemed to be a navigable water to all intents and purposes as if the tide ebbed and flowed therein.

To this the Commissioners of Virginia replied by submitting the draft of a compact, containing the following propositions: [II.]

1. The dominion and jurisdiction of the State of Virginia, retained under her deed of cession aforesaid, henceforth to be deemed and taken to extend, under all circumstances, to the actual edge, for the time being, of the water within the banks of the Ohio river, on the northwestern side of the said river; and the same shall be in no manner diminished, impaired, impeded, or any otherwise affected by any claims which the State of Ohio may have, by virtue of this compact or otherwise, to the soil which shall at any time be beneath the water in the said river.

2. The State of Ohio shall have dominion and exclusive jurisdiction over the banks of the said river on the northwestern side thereof, at all times, and over the soil on the same side of the river below the banks, whenever, and so far as the same shall not be covered with the water of said river—subject to the reasonable uses of all persons navigating the river: *Provided, however*, that if it shall at any time happen, that there is no water flowing between any island or islands in the said river and the bank thereof on the said northwestern side, in all such cases the dominion and exclusive jurisdiction of the State of Ohio shall extend only to the middle of the channel between such bank and such island or islands.

3. All boats, vessels, rafts, and watercraft of every kind, fastened or attached to the shore, or moored by it, for the purpose of holding communication therewith, on either side of the said river, shall be

deemed and taken to be, for the time being, under the exclusive jurisdiction of the State on that side of the river, for the purpose of a due execution of its police regulations, and for the service of process in all cases, civil and criminal, in which the cause of action or subject matter of controversy arose, or the offence charged was committed on board of such boat, vessel, raft, or watercraft, while lying so fastened, attached or moored, or arose or was committed elsewhere within the limits of the said State by persons found on board of such boat, vessel, raft, or watercraft—and for no other purpose: *Provided*, that nothing herein contained shall be construed so as to give or attach any jurisdiction of such a nature as to change, alter, or amend any rights of property on board of such boat, vessel, raft, or watercraft, situated as aforesaid; and that all questions which may arise concerning the right, title, or ownership of any property on board of such boat, vessel, raft, or watercraft, shall be adjudged and determined in like manner as if such boat, vessel, raft, or watercraft had not been so fastened, attached or moored.

4. In all other cases, the concurrent jurisdiction on the Ohio river, to which the State of Ohio is entitled under the provisions of the act of Assembly of Virginia, passed on the 18th day of December, 1789, hereinbefore mentioned, and the 7th article of the compact with Kentucky therein contained, shall be deemed and taken to extend to the actual edge, for the time being, of the water within the banks of the said river on the southeastern side thereof—saving and excepting, however, from such jurisdiction all islands in the said river: and such islands shall be as fully exempt from any jurisdiction of the State of Ohio, as if they were a part of the main land of Virginia.

5. Nothing in this compact contained shall be construed so as to abridge, alter, or vary the right to the free and common use and navigation of the Ohio river, reserved to all the citizens of the United States by the State of Virginia in her act of Assembly aforesaid, passed on the 18th day of December, 1789, and the 7th article of the compact with Kentucky, contained therein: and if any citizen or citizens of any of the United States shall, while navigating the said river, or ascending or descending the same, with property or effects of any kind belonging to them according to the laws of their respective States, be forced by any casualty, misfortune, or superior force, to take refuge, or go upon the banks or shores of the said river on either side thereof, and to bring their property or effects thereon, they shall be protected, during their

necessary stay or detention, in the enjoyment of all the rights of person and property which they hold under the laws of their respective States, and be permitted to resume and pursue their voyage with all their property and effects, without any unreasonable delay, and without let or hindrance of any kind.

6. The State of Ohio and her citizens shall have the right to make and carry out into the said river wharves, piers, quays, and other necessary works and improvements, along the margin of the river on the northwestern side thereof—so, however, as not in any manner to obstruct or injure the common use and navigation of the river, or to occasion a change in the direction or force of the current, that may endanger and encroach on the bank of the river on the opposite side, or any island in the bed thereof. And if either of the said States of Virginia and Ohio, or any of the citizens of either, in a corporate capacity or otherwise, shall desire to erect and construct any bridge, causeway, viaduct, aqueduct, or other structure of general utility, and for public use, reserving such reasonable tolls as the Legislature of such State shall authorize—which said bridge, causeway, viaduct, aqueduct, or other structure as aforesaid, shall not impair the navigation of the said river, such State, body corporate, companies, or individuals, shall have such necessary rights of abutment on the opposite side of the said river, and of erecting piers on the bed thereof, as shall be required for the due and proper construction of their works, as aforesaid, paying such compensation therefor to the owners of private property as the parties may agree, or damages duly assessed, in such mode as the laws of the State in which the property is located provide or shall provide for like cases; and this provision and stipulation shall apply to any work unauthorized by the laws of either of the said States now in progress, as fully as to any hereafter to be commenced. And it shall be lawful for the State so constructing, or whose citizens, as aforesaid, shall construct such work or works, to provide for their protection, and for the punishment of any wilful or malicious injury, or destruction of the same, which may be committed on either side of the said river.

To this the Commissioners of Ohio replied, by submitting the modified draft of a compact containing the six following propositions: [III.]

1. The dominion and jurisdiction of the State of Virginia shall extend to the edge of the water of said river on the northwestern side, when the same is at low water mark: *Provided*, however, that if it shall at any time happen that there is no water flowing between

any island or islands in the said river and the bank thereof on the northwestern side, in all such cases the dominion and jurisdiction of Virginia shall extend to the middle of the channel between such bank and such island or islands.

2. The State of Ohio shall have dominion over the banks and shore of said river on the northwestern side thereof to low water mark: *Provided*, however, that if it shall at any time happen that there is no water flowing between any island or islands in the said river and the bank thereof on the said northwestern side, in all such cases the dominion of Ohio shall extend only to the middle of the channel between such bank or such island or islands.

3. All boats, vessels, rafts, and watercraft of every kind, fastened or attached to the shore, or moored by it for the purpose of holding communication therewith, on either side of the said river, shall be deemed and taken to be, for the time being, under the exclusive jurisdiction of the State on that side of the river: *Provided*, that the persons and property of citizens of Virginia while in boats so attached to or moored by the Ohio shore, and all acts done or instruments executed by such citizens of Virginia, or to them, to pass property in Virginia, or otherwise, to have effect in said State—and the persons and property of citizens of Ohio, while in boats attached to or moored by the Virginia shore, and all acts done or instruments executed by such citizens of Ohio, or to them, to pass property in Ohio, or otherwise, to have effect in said State—shall be within the concurrent jurisdiction of the two States.

4. In all other cases the two States shall have concurrent jurisdiction over the Ohio river, to the actual edge, for the time being, of the water within the banks of the said river—saving and excepting, however, from such jurisdiction all islands in the said river; and such islands shall be as fully exempt from any jurisdiction of the State of Ohio as if they were a part of the main land of Virginia.

5. Nothing in this compact contained shall be construed so as to abridge, alter, or vary the right to the free and common use and navigation of the Ohio river, reserved to all the citizens of the United States by the Ordinance of Congress of July 13, 1787, and by the State of Virginia in her act of Assembly, passed on the 18th day of December, 1789, and the 7th article of the compact with Kentucky contained therein.

6. The State of Ohio and her citizens shall have the right to make and carry out into the said river, wharves, piers, quays, locks,

slopes, and other necessary works and improvements along the margin of the said river on the northwestern side thereof, so, however, as not in any manner to obstruct and injure the common use and navigation thereof: and said State shall have exclusive jurisdiction over such works and improvements so extended into said river.

To this the Commissioners of Virginia replied by submitting the following "*Observations:*" [IV.]

Some of the proposed modifications, which involved matters of but secondary importance, might be yielded to if there should be a prospect of arriving at a satisfactory understanding upon others of a more fundamental character.

In the project submitted by them, the Commissioners of Virginia, in a spirit of compromise, departing from what they considered to be the well founded claims of their State in point of strict legal right, proposed to make the actual edge of the water, for the time being, on the northwestern side of the river, the line of demarkation between the dominion and sovereign jurisdiction of the two States respectively. In analogy is the well understood principle of the English law which regulates the respective jurisdictions of the admiralty and common law Courts, upon the shores of tide water rivers, they were willing that the territorial dominion of the State of Ohio should extend over the naked shore down to low water mark on that side, as the water in the river recedes, while the dominion retained by Virginia over the river, with all its rightful incidents, should accompany and be co-extensive with the water between its banks, to the actual edge thereof, on the same side, in all its stages. Such a line possesses the great recommendation of being at all times visible and notorious; and, together with the "concurrent jurisdiction on the river," conceded (for the future benefit of the States that should afterwards be formed on the northwestern side thereof,) by Virginia, in her act of Assembly, on the 18th day of December, 1789, and the additional stipulations contained in the project under consideration, it seemed sufficient to secure to the State of Ohio every convenience and accommodation she could desire.

The modifications proposed by the honorable Commissioners of Ohio, instead of this arrangement of mutual convenience, go to restrain the dominion retained by Virginia over the Ohio river, to what is, during three fourths of the year, an uncertain, invisible, and unascertainable line on its surface, designed to correspond with the supposed, but thus unseen and unknown, low water mark on its

bed, and which line is in many places, at such times, distant by several hundred feet from the actual margin of the river on the northwestern shore.

To these modifications, as well as to those which reject the guards and securities for the rights of citizens of Virginia, held under the sanction of her laws, with which it seemed but just and reasonable to accompany the concessions yielded to Ohio, of an exclusive jurisdiction, under certain circumstances, over a part of the river, and other privileges on the northwestern side thereof, the Commissioners of Virginia, earnestly desirous as they are of cultivating a mutual spirit of conciliation, do not feel themselves at liberty to accede, in any view which they have been able to take of the right interests, as well as duties, which belong to the occasion.

If these points can be satisfactorily adjusted, some other of the modifications proposed by the Commissioners of Ohio, and particularly the alteration in the 6th article, would present no insuperable impediment to a final arrangement, as far as the Commissioners of Virginia are concerned.

To these observations the Commissioners of Ohio made a reply, from which we extract the following: [V.]

There is, we believe, a universal opinion in the State of Ohio, that the dominion of that State extends at least to low water mark in the river. In this we are supported by the judgment and opinion of the Supreme Court of the United States, by that of the Supreme Court of the State of Ohio, and also by that of the General Court of Virginia, in a recent and well considered case. These opinions and adjudications of the judicial tribunals of the three proposed parties to a compact of boundary, bearing as they do upon the very point under consideration, are entitled to very great respect; and we feel safe in relying upon them as authority, so far as touches authority and dominion.

Impressed with these views, and being desirous that all causes of controversy should be removed, we have proposed not only to conform to these decisions, but to concede what they may have left in doubt, the dominion of all islands which lie between low water mark and the Ohio shore. But we cannot go further: we cannot recede from a boundary in which we are so strongly fortified by authority.

In addition to this, the citizens of Ohio owning land on the shore, believe that the soil to low water mark belongs to them in property by virtue of grants from the United States; and in this they are sup-

ported by the Supreme Court of that State: and we do not feel at liberty to concur in any adjustment of boundary which shall disturb these tenures.

This branch of the negotiation was closed by a reply of the Virginia Commissioners, from which we extract the following: [VI.]

They learn with regret, that the Commissioners of Ohio are unwilling to settle the question of boundary between the two States, on any other basis than that of the recognition and establishment of the low water line on the northwestern side of the Ohio river, as the limit terminating the dominion retained by Virginia over the river. This they considered the utmost extent to which the claim of Ohio has, at any time, been seriously pressed; more especially, as a larger claim has been repeatedly, very recently, and, as they believe, invariably, repudiated by the judicial tribunals of the State. On the other hand, Virginia has, in the most solemn form, and by her highest public authority, asserted her dominion to extend legitimately over the whole bed of the river, as well as that portion of it which may be occasionally left bare by the temporary receding of the water, as that which is covered, at all times, with the water of the stream between its banks. Under these circumstances, the only hope of adjustment must have rested on the disposition of each party to abate something from the rigor and full extent of its claims. This the Commissioners of Virginia think they have done, on their part, in no stinted measure, by proposing to make the actual edge of the water, for the time being, on the northwestern side of the river, the line of territorial demarkation, while the Commissioners of Ohio stand inflexibly upon the original claim of their State to low water mark, without any abatement therefrom not already practically established.

The Commissioners of Ohio refer to a recent decision of the General Court of Virginia, as sustaining them in their rejection of the line of boundary proposed by the Commissioners of Virginia. It will be found, on the contrary, when the opinions of the Judges in that case are analyzed and examined, that a majority of them affirmed the rightful authority of Virginia over the river, at least to the water's edge, for the time being, on the northwestern side thereof: two of the members of the Court, who concurred in the judgment rendered for the defendants, having expressed themselves directly to that effect, and, when added to the five others, who sustained the full territorial claim of the State, making a majority of the Court. In like manner, the proposition to make the actual edge of the water,

for the time being, the line of boundary on the northwestern side of the river, derives a more important sanction from two decisions, on the very point, of the highest Court of Kentucky, (*Church, &c.* v. *Chambers*, 3 *Dana* 274, and *McFarland, &c.* v. *McKnight*, 2 *B. Mon.* 500,) by one of which "the river Ohio *from shore to shore*" is declared to be within the "boundaries" of that State; and in the other it is adjudged, that "the right of domain, sovereignty, and jurisdiction—the whole power, legislative, executive, and judicial, belongs to the State of Kentucky, *over the waters of the Ohio river to the northwestern shore or bank.*" These solemn decisions of the highest Court of Judicature of a State standing in precisely the same relation to the question now under consideration as Virginia, abundantly show that the extra-judicial opinion of the Supreme Court of the United States, referred to by the Commissioners of Ohio, has failed to settle the law of the case, and will, in all probability, be subjected to a critical and deliberate re-examination—a test, which, in the opinion of the Commissioners of Virginia, it will be found incapable to abide.

The Commissioners of Virginia having expressed their willingness to entertain propositions for the settlement of *jurisdiction* alone, the Commissioners of Ohio now submitted the draft of a compact for this purpose, containing the three following propositions: [VII.]

1. That all structures and works of every kind, that may have been or shall hereafter be erected on either shore of the Ohio river, not injurious to the navigation thereof, and all boats, vessels, rafts, and watercrafts of every kind, fastened or attached to the shore, or moored by it for the purpose of holding communication therewith, on either side of the said river, shall be deemed and taken to be, for the time being, under the exclusive jurisdiction of the State on that side of the river: *Provided*, that the persons and property of citizens of Virginia, while in boats so attached to or moored by the Ohio shore, and all acts done or instruments executed by such citizens of Virginia, or to them, to pass property in Virginia, or otherwise, to have effect in said State, shall be within the concurrent jurisdiction of the two States.

2. In all other cases the two States shall have concurrent jurisdiction over the Ohio river to the actual edge, for the time being, of the water within the banks of said river: saving and excepting, however, from such jurisdiction, all islands in the said river; and such islands shall be as fully exempt from any jurisdiction of the State of Ohio as if they were a part of the main land of Virginia.

3. Nothing in this compact contained, shall be construed so as to abridge or alter, or vary the right to the free and common use and navigation of the Ohio river, reserved to all the citizens of the United States by the Ordinance of Congress of July 13th, 1787, and by the State of Virginia in her act of Assembly, passed on the 18th day of December, 1789, and the 7th article of the compact with Kentucky, contained therein.

To this "project of a compact" the Commissioners of Virginia made the following reply: [VIII.]

In that project, while important concessions are required from Virginia, of an exclusive jurisdiction to Ohio under certain circumstances, over the northwestern margin of the river, and also of a general and unlimited concurrent jurisdiction over the whole river, there is no security offered in return for the rights of citizens of Virginia, held under the sanction of her laws, which would be thus placed in jeopardy by bringing them under the operation of a different system of jurisprudence. The full preservation and protection of the rights of her citizens, under all circumstances, formed, it is believed, the chief motive for the reservation of the Ohio river as a part of her domain, by Virginia, in her deed of cession of the Northwestern Territory. Proper and adequate security, therefore, for the rights of citizens of Virginia, held under the authority of her laws, on any and every part of the river, against any adverse action of the tribunals of Ohio, in virtue of the arrangements of jurisdiction proposed by the Commissioners of that State, in the first and second articles of their project, is, in the estimation of the Commissioners of Virginia, an indispensable accompaniment and condition of those arrangements.

If the Commissioners of Ohio are prepared to give their assent to this principle, then the Commissioners of Virginia will present articles framed with the necessary detail to preserve and give full practical effect to it.

Upon this paper, No. VIII., the Commissioners of Ohio, in their *Report*, make the following comment:

When the paper No. VIII. was presented to us, one of the Commissioners of Virginia suggested that the security which he would consider "proper and adequate" against the adverse action of the tribunals of Ohio, under the articles referred to, must be—

1. A recognition of so much of the Ordinance of Congress of July 13th, 1787, and the act of the Legislature of Virginia, of December 18, 1789, and the compact with Kentucky therein contained,

as make the Ohio river a common highway, free to all the citizens of the United States.

2. Such a *construction* of those instruments to be incorporated into the compact as would afford absolute protection to the rights of person and property of citizens of Virginia, as they exist in Virginia, while floating upon the river any where within its banks, and while moored by or attached to either shore.

And on a subsequent day it was explained to us as another requisite, that if the clause in the compact which would provide this security, be holden void, as against the Ordinance of July 13th, 1787, or as against the Constitution of the State of Ohio, in that case the whole compact should be therefore void.

This explanation was not given us by the Commissioners of Virginia, as a Board. Their views we could only gather from the paper which they handed us, and the informal conversation of the members of that Board during our several conferences. The paper, strictly and exactly construed, asks security for such rights only of the persons and property of citizens of Virginia as might be jeoparded under and by reason of the proposed compact, and so it was afterwards explained to us by the Commissioners of Virginia. For the security we declared ourselves ready to stipulate, fixing those rights by the most stringent language that could be devised, to be and remain what they *now* are, and leaving them unaltered—thus confining our regulations to criminal jurisdiction, commerce, and convenient structures on the shore. A well framed project of a compact, conceived in this spirit and with this view, was, in our last consultation, read to us by one of the Commissioners of Virginia, to which, with slight modifications, we believed we could give our consent, and make it substantially the basis of a compact. We so said to the Commissioners of Virginia, who, on consultation, were unable to assure us that its principles would be adopted by all the members of their Board, unless accompanied by the construction above named, of the Ordinance of 1787, and the act of Virginia of December 18th, 1789, and a provision avoiding the compact, if that construction should be held inefficient by our Courts, as against the provisions of said Ordinance, or against the Constitution of Ohio.

But in their reply to the Commissioners of Virginia, after saying that their proposition was framed to a view of perfect reciprocity, they proceed: [IX.]

It is not understood by the Commissioners of Ohio to concede any thing, upon either side, without an exactly equivalent concession on the other; and, on a review of the proposition, such seems to them still to be, substantially as well as literally, its character.

That it is not found so by the Commissioners of Virginia, seems to arise partly from their claim to dominion, in behalf of Virginia, on the northwest side of the Ohio river, beyond what the Commissioners of Ohio conceive to be its legitimate limits, and partly from a claim new to us, of certain paramount and exclusive rights, as to jurisdiction over the Ohio river, supposed to be retained by Virginia, limiting and restricting and rendering in some degree subordinate the concurrent jurisdiction of the State of Ohio over the said river —a principle which the Commissioners of Ohio can by no means concede, and which, at this stage of the negotiation, they do not deem it profitable to discuss.

The Commissioners of Virginia say, in reference to the further progress of the negotiation, that proper and adequate security "for the rights of citizens of Virginia, held under the authority of her laws, on any and every part of the river, against any adverse action of the tribunals of Ohio, in virtue of the arrangements of jurisdiction proposed by the Commissioners of that State, in the first and second articles of their project, is, in the estimation of the Commissioners of Virginia, an indispensable accompaniment and condition of those arrangements," and that if the Commissioners of Ohio are prepared to give their assent to these principles, the Commissioners of Virginia will present articles to carry them into effect.

In reference to this suggestion, the Commissioners of Ohio have to remark—that the rights of citizens of Virginia, held under her laws, within her dominion, cannot be affected or impaired by either the concurrent jurisdiction, as it now exists, or by such modification of that concurrent jurisdiction as they have proposed: and the rights of citizens of Virginia to their property within the domain of that State and under its laws, being perfect, there need be, and there can be no further security against the action of the tribunals of Ohio upon it than is already found in the character of those tribunals, and in the supervisory power which the Supreme Court of the United States has over their decisions.

On the other hand, where the concurrent jurisdiction extends, or is proposed to be extended over the soil and dominion of the State of Ohio, the Commissioners of Ohio cannot consent that any thing shall be withdrawn, except as incident to the concurrent jurisdiction heretofore proposed, from the operation of her laws and the action of her tribunals; and, so far as the Constitution of that State may be found to affect the question, we need hardly say to the commissioners of Virginia, that it were not in the power of the Commission, with

all its proposed sanctions, to entrench, in the slightest degree, the provisions of that instrument.

The guaranty asked by the Commissioners of Virginia, if effectual, must carry with it, expressly or by implication, the concession of boundary and dominion proposed in their draft of compact, presented on the 13th instant, to which the Commissioners of Ohio felt themselves unable to accede; and they are therefore not prepared to give their assent to the principles proposed by the Commissioners of Virginia as the basis of further negotiations.

The negotiations were closed on the 26th of January, 1848, by the following "*Remarks*" from the Commissioners of Virginia: [X.]

In reference to the character of entire reciprocity, claimed by the Commissioners of Ohio for the proposition submitted by them on the 23d instant; when it is borne in mind that the exclusive jurisdiction proposed to be given, under certain circumstances, over a portion of the river along either shore, was, on the Ohio side, not restrained to the low water line, the boundary claimed by that State, and would, doubtless, in point of fact, often pass over that line into the dominion of Virginia, it is manifest there could be no practical reciprocity in giving, in words, a like jurisdiction to Virginia on her side of the river, where her acknowledged dominion over the river was already complete and unlimited. If it be said, that, by the terms of the compact between Virginia and Kentucky, Ohio has a concurrent jurisdiction over the river on the the Virginia side; which, in the proposed arrangement for exclusive jurisdiction along the margin of the river on the respective shores, she agrees to waive in favor of Virginia in the cases provided for, it cannot surely be alleged that a waiver of concurrent jurisdiction alone is an "exact equivalent concession" for a waiver of both concurrent jurisdiction and dominion, of the acknowledged dominion of Virginia below low water mark on the northwestern side of the river, as well as of dominion claimed by her above low water mark as far as the bed of the river extends.

In regard to the nature and extent of the concurrent jurisdiction of the Ohio river, now held by the State of Ohio, under the 7th article of the compact between Virginia and Kentucky, it must be apparent to the Commissioners of Ohio that a jurisdiction of that kind, granted in connection with, and as incident to, the free and common use and navigation of the river, (which was the chief subject matter of the stipulation of that compact above referred to,) is a very different thing in terms, and may well be in its practical con-

sequences, from the general and unqualified concurrent jurisdiction now proposed to be given as a substantive and independent arrangement.

The effect, then, of the arrangements proposed by the Commissioners of Ohio, respecting concurrent as well as exclusive jurisdiction, being to give a new and enlarged scope to both in behalf of Ohio, not merely without a practical reciprocity as to Virginia, but in such a way as to expose the rights of her citizens, held under the protection of her laws, to new and extraneous hazards, nothing seemed more reasonable than that that concession and accommodation sought from one party, should be accompanied with corresponding concessions and accommodations tendered by the other: or at least the dangers on the one side should be countervailed by securities on the other. Less could not have been expected than that the rights of Virginia, enjoyed under the sanction of her laws, when brought under the operation of a different system of laws, and of other tribunals than her own, in virtue of the very arrangements respecting jurisdiction, proposed by the Commissioners of Ohio, should be guarantied from harm in consequence of this superinduced jurisdiction, not merely by vague legal deductions and implications, but in explicit and unequivocal terms. Virginia asks no guaranty for the rights of her citizens from Ohio, so long as the existing state of things is maintained. But when Ohio seeks to change that state of things in a mode involving risk and embarrassment to the rights of the citizens of Virginia, Virginia cannot consent to the change, without just countervailing securities.

To say, in answer to this demand, that Ohio cannot agree to withdraw any thing within the limits of her dominion from the operation of her laws and the action of her tribunals, is to assume as settled the very question of boundary which the Commissioners of Ohio, in suggesting an arrangement respecting jurisdiction alone, proposed should be left open. The space over which exclusive jurisdiction is proposed by them to be given to the State of Ohio, is debateable ground, as to boundary, at least above low water mark. While treating of jurisdiction, apart from boundary, the argument above named implies that the arrangement for exclusive jurisdiction, proposed by the Commissioners of Ohio, is equivalent to, if not identical with, an establishment of boundary. To the allusion made to the overruling authority of the Constitution of Ohio, the Commissioners would merely remark, that no conflict with the provisions of that instrument is involved in any thing they have proposed, and

even if it were otherwise, that instrument, high and justly entitled to respect as it is, must nevertheless be construed in subordination to the guarantees contained in the Ordinance of 1787, and the compact between Virginia and Kentucky, of the free and common use and navigation of the Ohio river, to the citizens of the United States, with all the rightful consequences, whatever they may be, deducible from that guaranty.

In conclusion, it is only left for the Commissioners of Virginia further to remark, that the Commissioners of Ohio having declined giving their assent to a principle which they deem to be incontrovertible justice, and which they have already declared to be, in their estimation, an indispensable accompaniment and condition of the arrangements proposed on the part of Ohio, the negotiations in which they have been engaged are thereby necessarily brought to a close. Their regret at this result is diminished by the belief that no material inconvenience is likely to flow from it to either party, if a spirit of good neighborhood and friendly intercourse shall continue to prevail between two States having so many motives to cultivate cordial and mutually beneficial relations with each other.

The Ohio Commsioners close their Report as follows:

Under these circumstances, we felt ourselves constrained to close our conference without having effected the adjustment, in either of its branches, which was the object of our mission. But we feel the less regret in having failed to do so, as, in our opinion, the onward course of events is constantly and rapidly removing all the obstacles which now lie in the way of such adjustment.

In conclusion, we are happy to bear testimony to the cordial good will with which the Commissioners of Virginia, individually and as a Board, united their earnest efforts with ours to remove difficulties and reconcile conflicting opinions and interests, so as to effect the great purpose for which we met, in a manner satisfactory to the people of our respective States, and useful to all; and that we failed to do so is owing to the difficulties which are at this time inherent in the subject itself, and not to any want of effort on the part of either commission.

It was our intention to have commented at some length upon the positions respectively assumed in this negotiation, and the "*difficulties*" which caused its failure. But the space already taken up is all that can now be spared; and our comments must be deferred to a more convenient season.

ADDRESS OF THE EXECUTIVE COMMITTEE OF THE NEW YORK STATE SOCIETY FOR THE ABOLITION OF CAPITAL PUNISHMENT, AT ITS FIFTH ANNIVERSARY, NEW YORK, MAY 3, 1848.

[By H. Titus.]

It is now about two thousand years since the Saviour came on earth to fulfil his predicted mission, and left his gospel—the divinely attested record of the will of the Father, and the everlasting promise of reward to individuals who should rule their conduct in life conformably with that revelation. Under a former revelation, many years antecedent to the advent of Christ, the result of his mission on the welfare of society was spoken of, by favored prophets, in these hopeful and consoling words: [*Isaiah, Chap. XI.*]

Verse 6. "The wolf shall dwell with the lamb, and the leopard shall lie down with the kid; and the calf and the young lion and the fatling together; and a little child shall lead them."

Verse 7. "And the cow and the bear shall feed; their young ones shall lie down together; and the lion shall eat straw like the ox."

Verse 8. "And the suckling child shall play on the hole of the asp; and the weaned child shall put his hand on the cockatrice's den."

Verse 9. "They shall not hurt nor destroy in all my holy mountain: for the earth shall be full of the knowledge of the Lord, as the waters cover the sea."

Also, *Psalm* 85:

Verse 10. "Mercy and truth are met together: righteousness and peace have kissed each other."

Long and weary were the years of anticipation experienced by the faithful, before their watchful eyes were greeted by the glorious appearance of the true Messiah; and long and weary has been the experience of his followers in their expectation of those blessed results on the welfare of society foretold by those prophets. The rich reward predicted as appertaining to individuals for faith in the Saviour and obedience to His precepts has been realized by his true disciples ever since. "He walked with man;" but the peaceful state of society, and the beneficent character of civil law spoken of by the prophets, as yet have had their fulfilment but to a limited and qualified extent. On the contrary, much of the history of civil institutions, since the promulgation of Christ's gospel,

"Bears witness, O thou wronged and merciful one!
That earth's most hateful crimes have in thy name been done."

Yet, the predictions of the prophets still stand; and the true Chris-

tian will not cease to believe that the promises appertaining to civil institutions, in their proper time, will be as fully accomplished as have been those which related to man in his individual capacity. Ever since Christ preached his sermon on the mount, the nearer civil government has conformed to his precepts, as then published, the closer has been the approach toward a fulfilment of the hopeful and consoling promises of the prophets above quoted; and it will not occur until statesmen recognize the supremacy of the organic law of the gospel as implicitly in their judicial halls and legislative chambers, as it is in the temples of public worship, and the closets of private prayer, that any reasonable hope can be entertained for the enjoyment by society of those promises. It is only when acting in conformity with Christ's precepts, that individuals attain the state of beatitude predicted as in store for them, and thus also must governments legislate and rule before they can realize the promises of prophecy.

"The New York State Society for the Abolition of Capital Punishment," recognizes in its Constitution these gospel truths, and designs always to regulate its action on principles strictly in conformity therewith. It therefore selects this week, in concert with various Christian associations throughout the State and nation, to celebrate its anniversary; notwithstanding the uncharitable taunts heretofore cast upon it, it still will claim for itself the credit of as much disinterested philanthropy and of as much sincere Christian impulse, as may be awarded to any other association holding its anniversary at this time in our city.

During this week, Societies for the distribution of Bibles, for the establishment of Missions, for the suppression of American and foreign slave-dealing, for the support of Sunday Schools, for the promotion of African colonization, for the distribution of Tracts, for the education of the Blind and the Deaf and Dumb, for the melioration of the condition of the Jews, for the promotion of temperance, for the encouragement of the sacred observance of the Sabbath, and many other humane and religious societies, in holding their anniversaries, will deservedly excite great interest among our citizens, and attract much of their attention. We award to each and all the full meed of praise to which they are entitled, and we wish them God's speed in their respective enterprises; but we at the same time will claim for our anniversary the right to excite as great interest and to attract as much attention; and we think we are entitled, alike with those societies, to our meed of praise and to the good wishes of

the community for the success of our humane enterprize. We, however, do not, at this time, expect to receive our due in either of these particulars: as yet, the prejudice of preconceived opinions—the force of a habit of thought, and the arbitrary will of sectarian education, all combine to prevent a just appreciation of our motives or a proper apprehension of the nature of the reform we advocate. The Society, although not enjoying the benign influence of encouragement from fellow Christian associations, to the extent it deserves, still has never had occasion to feel disheartened in its philanthropic efforts. From the date of its organization each successive year has yielded an increased amount of flattering hopes.

We have been instrumental from year to year, not only in the Legislature of our own State, but also in many others, of having the subject of capital punishment seriously entertained, and, in frequent instances, elaborately discussed: and we have the satisfaction of knowing, that in proportion as we succeed in bringing the attention of legislators to the nature and effect of the death penalty, just so fast do we gain converts to our cause; and the same remark applies to individuals in society. This shows that the public mind is well prepared for the dissemination of our views; we may say we have found it ready and eager to reach the conviction under which we act, that the horrid outrage committed on our natural sympathies in the execution of a fellow being, be he ever so great a criminal, is as uncalled-for by scriptural or gospel precepts, as it has been proved needless for the protection of society.

Previous to the present century, the advocacy of the abolition of capital punishment was confined within very narrow limits, and to a few individuals. Now it has become a regular subject of discussion in the Legislative Councils of every Christian State and Nation; and among its advocates are found many of the most prominent statesmen, philanthropists, clergymen, and jurists of the age. A qualification, however, must be made to this remark, so far as it applies to the clergymen of *this* country. Heretofore, that respected class of our citizens, with some conspicuous and honorable exceptions, have generally arrayed themselves in the defence of the extreme punishment, whereby our opponents have enjoyed an adventitious aid, and we have experienced some disappointment. We felt that we had a right to claim the clergy as the natural allies of the advocates of the abolition of the death penalty; and such they, in an efficient measure, have proved themselves to be throughout Europe, and such we yet hope to find them here, when they lay

aside the prejudice of education, and base their opinions solely upon an independent investigation of the subject, and upon a more free exercise of private judgment.

The Recording Secretary of our Society has received lately a letter from one of the Secretaries of the London Society, in which, among many encouraging accounts, he says: "The cause looks well in England: we have a great accession of strength in Parliament, and shall put the same to the test in two or three weeks, by proposing the subject of total repeal for legislative consideration. Farther, we have gained more than half of the clergy of all denominations, and we have the middle classes with us almost to a man."

The head of that church, which for centuries has exercised a much more extensive dominion than any other—of that church, which for many years, through the medium of the bloody Inquisition, strove to aggrandize its spiritual and temporal power by hecatombs of human victims—now solemnly expresses his doubt both as to the right and expediency of capital punishment for any offence. Pope Pius IX., in his liberal and enlightened course of political and moral reform, earnestly avows his full sympathy in sentiment with those who advocate the total repeal of the death penalty; and Father Matthew, the indefatigable philanthropist and skilful reformer of the age, also contributes the force of his eloquence and the weight of his distinguished name toward the promotion of our cause.

In France the abolition is already effected, so far as the penalty applied to political offenders; and that great and good man, Lamartine,—the Washington of his country,—gives the full power of his wisdom and of his moral character in aid of the advocacy of the total abolition of capital punishment.

Tuscany has again erased from her statute book every vestige of blood, and her citizens have destroyed every implement heretofore used in the perpetration of judicial murders.

"In Belgium," says Dr. Patterson, in an interesting article, lately published on this subject, "the cause has many learned and distinguished advocates. Brom Berlin, we learn that in the commission appointed to revise the criminal code of Prussia, five out of the twelve members were in favor of reporting a system in which capital punishment should not appear. Russia continues the policy established by the Empress Elizabeth, and the present Vice President of the United States—himself an ardent supporter of the abolition, and recently, our Minister at St. Petersburgh, testifies to its practical advantages, and the unanimous approval of its workings

by the jurists of that country. Prince Oscar, of Sweden, an honor to royalty, has lately issued a work on Penal Discipline, in which he urges the abandonment of the penalty of death.

In the United States, as yet, the total abolition has only been effected in the distinguished and enviable instance of the State of Michigan; but the effect of the advocacy of one humane reform has been such as to curtail the sway of the human hangman within very narrow limits. The progress already effected is a sure earnest of the early and full accomplishment of our desired object; and when we reflect how rapidly public opinion is becoming released from the thraldom of prejudice and of a superstitious reverence for a prescribed acceptation of a single text of the Old Testament, and how cheerfully it inclines to the more reasonable and humane translation of the same, and also to our more Christian-like application of gospel precepts—then it is that we have good ground to believe that we can perceive the dawn of that day in which will be realized the results of the Messiah advent, appertaining to civil institutions, as predicted by the holy prophets quoted in the first part of this address. How much more Christian-like public opinion of the present day, in this State, is in reference to corporeal and capital punishments, than formerly, may be realized from the consideration of the record of the fact, that the Legislature, "on the 8th day of March, 1808, passed a law inflicting death for a crime which actually subjected the offender to imprisonment for life, and authorized whipping for petit larceny." But at the same time let it be mentioned, to the honor of our then Governor—the humane, patriotic and enlightened Tompkins—that he embraced the opportunity of his Message to the Senate and Assembly, on the 1st day of November following, to express his abhorrence of the spirit of such legislation, and also his doubts as to the right or expediency of it. At a subsequent date, in another of his annual Messages, his generous heart and sound judgment dictated the following eloquent passage and noble sentiment: "On a former occasion I had the honor to communicate to the Legislature my ideas of corporeal and capital punishments. I shall not, therefore, dwell upon that theme now, longer than to repeat that I have always entertained serious doubts of the right of society to take away life in any case. That such extreme and vindictive punishment is by no means indispensable for the preservation of the social compact, or for the peace and security of society; and that it is offensive and repugnant to those sympathetic emotions, those beneficent virtues, and the refinement of policy and of reason

which adorn civilized and free communities. If, by inviting your reflection once more to this interesting topic, I shall be so fortunate as to subserve the cause of humanity, by effacing from our revised code that vestige of barbarism, it will be to me a source of high and durable satisfaction." Thus we learn that the abolition of capital punishment was first suggested to the Legislature of this State by our lamented and revered Tompkins.

Shortly after this, our country became involved in the war with Great Britain, and the usual debasement of public morals incident to a state of warfare prevented for many years any serious agitation of the question, either in society or in the halls of legislation. What cause for congratulation have we, who, in the place of such moral darkness as characterized those times, are now freely enjoying, in the course of our legislation, "the mild sunshine of the gospel day"—and who, instead of encouraging the barbarous spirit of vindictiveness, as manifested in the laws referred to by Governor Tompkins, feel it to be alike our duty and our pleasure, to use our influence for the melioration of the condition of the criminal, and to let

> "Hope's sunshine linger on his prison wall,
> And Love look in upon his solitude."

This society, during its short existence, has distributed throughout the Union an immense number of documents, reports, essays, and statistical statements relative to the subject of capital punishment. It has furnished to each member of the Legislatures of Iowa, Pennsylvania, New Jersey, Rhode Island, Connecticut, and Delaware, and to various individuals in the other States, the Argument of E. Livingston, addressed to the Legislature of Louisiana, the Address of Hon. Charles Mason, Chief Justice of Iowa, and various other documents. It is daily applied to from every section of the country for such supplies, to which it cheerfully responds according to its abilities. But its funds and its abilities to the service required are not in correspondence with the extent of the demands made. The expense and labor have fallen heavily upon individuals—too much so for their convenience, however willing they may be in spirit. It is therefore earnestly solicited of those friends of the cause, who, as yet, have not contributed their quota of funds and of services, that they would be prompt in doing what they may feel able and willing to do toward the promotion of our good cause.

The Executive Committee are unwilling to close this Address without acknowledging the obligation which the Society is under to

Freeman Hunt, Esq., of this city, for his liberal donation of a large edition of "Edward Livingston's Argument," and also for his efficient personal services rendered from the commencement of the Society's operations, and especially for his valuable and gratuitous aid in the capacity of Treasurer.

The friends of the cause are requested to make their contributions through him, at his office, No. 242 Fulton street.

The Executive Committee also desire to make known to the Society and to the friends of the cause, the efficient services, gratuitously rendered, during the whole period of the Society's existence, by Josiah Hopper, M. D., as Recording Secretary. Those who wish information or documents on the subject, will please address him at the office of the Merchant's Magazine, New York.

AN ATTORNEY ADVOCATE AND WITNESS IN THE SAME CAUSE.

By the recent decisions in English Courts, (*Stones* v. *Byron*, 1 *B. C. R.* 248, and *Dunn* v. *Packwood*, 1 *B. C. R.* 312,) it has been held that an attorney cannot be a witness in a cause in which he is advocate. In one of these cases, the attorney of the plaintiff, after addressing the jury, was examined as a witness, to rebut the case of the defendant; and in the other the attorney, after stating the case, gave testimony as a witness. The verdicts in both instances were set aside by Patteson, J., and by Earle, J., respectively. *

It is difficult to perceive by what principle of evidence, hitherto received in English Courts, this testimony was incompetent. The classes of persons incompetent to testify are the four following: 1. parties; 2. persons deficient in understanding; 3. persons insensible to the obligations of an oath; 4. persons whose pecuniary interest is directly involved in the matter in issue. It will hardly be maintained that this enumeration of causes of incompetency embraces attorneys engaged in the suit.

The testimony of an attorney in a cause, whenever he has had the impropriety to offer himself, has been received by the Court, and it is believed no cases, except those referred to, are known, in which he has been rejected merely on the ground of his being an

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* Vide vol. iv. page 546.

advocate in the case. Even in a criminal prosecution, in a cause of the first magnitude, both on account of the nature of the accusation and of the distinguished character of the accused, (*Sir Thomas More*) the testimony of the Solicitor General was admitted against the prisoner, and was the sole means of his conviction. The jury, prejudiced as they were, seeing that if they credited all the evidence, there was not the shadow of a case against the prisoner, were about to acquit him. The Judges were in dismay—the Attorney General stood aghast—when the Solicitor, to his eternal disgrace, and to the eternal disgrace of the Court who permitted such an outrage on decency, left the bar, and presented himself as a witness for the crown. Being sworn, he detailed the confidential conversation he had with the prisoner in the tower. *Lives of the Chancellors*, 1–580.

Such testimony having been admissible heretofore, both upon principle and precedent, the two cases mentioned must be taken as establishing a new rule.

The law of evidence, like every other branch of the law, has been greatly expanded, systematized, and improved by the exigencies of business and the development of new principles. A treatise on this part of the law two centuries ago, would present a meagre appearance in comparison with a modern work, as regards every thing that constitutes the science of a subject. Courts have exercised a large discretion in the application of ancient rules to new cases. From the very nature of law, this is proper and necessary. It would be impossible, at the establishment of a legal system, or at any subsequent period, to adopt a system of rules which would be applicable to every particular case without modification in the course of time. The infinite variety of circumstances in the affairs of men cannot be foreseen. "And therefore, if all the reason which is dispensed into many several heads, were united into one, yet could he not make such a law as the law of England is, because by successions of ages, it hath been fined and refined by an infinite number of good and learned men, and by long experience grown to such a perfection."

The application of an ancient rule or general principle to a new case, is the establishment of a new rule. It is the expansive character of law which adapts it to the affairs of men in all times and circumstances. Of these remarks the whole body of evidence is an appropriate and excellent illustration.

But it is conceived that this quality of jurisprudence does not au-

thorize the sudden and total repeal of well established rules, by judicial decisions; when the principle, whatever it may be, has once been fairly evolved, has been acknowledged as legitimate, and has been confirmed by practice, nothing short of legislative power ought to disturb it. Not to be bound by a rule, or to disregard a rule at option, is to destroy law itself, which is a rule of action. It sets the law at sea without chart or compass. To declare that a class of men, for instance parties, shall be competent to testify, or that the rule of privileged communications should be extended to physicians, is not within the power of an English Court. Would it be a greater stretch of power to declare a class of persons incompetent as witnesses under certain circumstances, when the testimony had always been admissible under the same circumstances, both upon the authority of cases and principles of evidence.

If a particular case, or a line of cases, is contrary to legal principle, the Court may legitimately, and are in fact under an obligation to overrule it as not being the law. For it will not be asserted that if Judges erred once, they are bound to persist in the error for the sake of consistency, or preserving the certainty of law. The certainty of law would in fact be shipwrecked by following erroneous decisions. It would substitute for principle mere precedent, beyond which the light of the best legal mind could not penetrate, and where *cases* failed, total darkness would ensue. An adherence to principles, in disregard of bad cases, is the only way to preserve the clearness, certainty, and order, which constitute the science of law.

It requires no nice discernment to perceive the difference between the overruling of ill considered precedents and the abrogation of a principle which is embedded in the law of evidence.

But while it is thought these two cases cannot be supported, it is not meant to disapprove of the principle which they establish. Though the law is, not that an attorney cannot be a witness and advocate in the same suit, yet it should be so; and if every other rule of incompetency were abolished, yet such an one as this ought to remain. It is not that attorneys are less likely than other men to feel the obligation of an oath, when they unite the characters of advocate and witness. On the contrary, it may be affirmed that lawyers are as sensible as any class of men, of the sacred obligation which an oath imposes, and perceive more clearly than most men, from observation and practical knowledge, the value of truth in the conduct of human affairs. The incompetency of the attorney need

not be rested on any uncharitable presumption. The law makes no presumptions dishonorable to human nature. As it never presumes fraud or crime against any single man, so it makes no presumption against men in general. Its opinion of human nature, formed and matured by the observation and experience of "many successions of ages," in various climates, and on a view of the worst aspects of malice, falsehood and wickedness, is favorable, and it has faith in the honesty and good intention of the mass of humanity.

But the attorney's exclusion should rest on peculiar grounds. He should be rejected, not for the protection of the opposite party, but for his own; not because his integrity may be exposed to temptation, but because it will be exposed to suspicion.

Let us consider for a moment the relation which he appears to sustain toward the party he represents.

He is employed to conduct and advocate the cause of his client. He has in most cases previously advised him, that under the given circumstances, the suit or defence can be successfully prosecuted or sustained. He is paid for the knowledge, industry, talent, and zeal he may exert in the cause. Though his compensation depends on no contingency of success or failure, yet he feels entitled to charge, and his client feels disposed to pay a higher fee when the cause terminates successfully. His sympathy for a losing client induces him to abate the amount of his charge, and he feels that a fortunate litigant can compensate him more liberally. There are cases too, in which, from the inability of his client, he must receive nothing, if the case is determined against him.

He has also received the partial and unfair statement of one side of the case. His views of it are discolored by the prejudice, excited feelings, or falsehood of one party. He believes, perhaps improperly, that his client has been a victim of wrong, and that the opposite party is influenced by bad motives. However profound may be his knowledge of men, or keen his discernment, he cannot entirely avoid such influences.

In addition to this unfounded confidence in the justice of his cause, he is perhaps ardent to prevail for the sake of victory. Reputation is greatly enhanced by success. The vulgar generally applaud the winning lawyer, as the winning horse, and have no better criterion of ability than the event of a suit. The successful termination of a case, especially a doubtful one, often attracts other business. In whatever degree some minds may be influenced by such

motives, there is no advocate wholly indifferent to the prestige which attends victory.

The lawyer who approaches a jury to sustain a case by his testimony, and to advocate it by his eloquence, places himself in an indecent position. Paid for the ability he may exert in obtaining success, deceived by a partial knowledge of the facts, and ardent to win, his testimony must be viewed with distrust. His statement, though perfectly reliable under other circumstances, is received with suspicion by the jury, generally consisting of men whose limited education and position in life give them no enlarged views of things, and no elevated opinion of human nature.

The incompetency of the attorney, therefore, need not be placed on the probability of the falsehood of his testimony. He should not be suffered by the Court to place himself in a position that may lessen his character, or diminish the confidence of men in the purity of the administration of justice. The opinion which the uneducated class, who are the majority of mankind, entertain of law and lawyers, is sufficiently unfavorable. They form their opinion from an occasional instance, in which a criminal has escaped the punishment due to his crimes by reason of a technical omission, or some case of hardship in a particular instance, from the necessary inflexibility of general rules, or the successful trick of a low attorney, in which cunning approximates to knavery. The refined distinctions incident to a legal science, are incomprehensible to them, and "the law's delay" and uncertainty are regarded as the effect of intended design. They misunderstand too, the nature of the contract of the attorney with his client, and suppose he is bound to advance a suit by any means whatever. The advocate who becomes a witness, occupies in their opinion, a position of perilous temptation; and they cannot believe that his integrity will not be prostrated beneath the solicitation of opportunity.

We have the authority of the civil law for the rule which would exclude the testimony of the attorney in a cause. "*Mandatis cavetur ut praecides attendant, ne patroni in causa cui patrocinium praestiterunt testimonium dicunt.*" *L.* 25 *ff. de Test.*

And Pothier says: "Upon the same foundation of a suspicion of falsehood, the evidence of the advocate or procureur of either of the parties ought not to be admitted. Their testimony would be liable to the suspicion of partiality, if they were witnesses in favor of their parties, and there would be an indecency in admitting them as witnesses against them." *Evans' Poth. P.* 4, *c.* 2, *Art.* 8.

Circleville, May, 1848. F.

SUPREME COURT OF OHIO: LAWRENCE COUNTY, APRIL TERM, 1848.

[BEFORE READ AND AVERY, JUSTICES.]

A. T. COMPSTON *v.* WILLIAM LAMBERT.

A promise made by a Justice of the Peace to indemnify one against the consequences of aiding in the arrest or detention of one under a void process, is void as against public policy, though the party was ignorant of the character of such process.

A promise made by a public officer claiming to act under a legal process, to indemnify one against all loss in case he will aid in enforcing the execution of the same, is void—though it turns out in the end that such process was void, and the parties liable as trespassers in enforcing it.

When a Justice of the Peace, claiming that a constable had a warrant, issued by himself, to arrest a person, and detain him in custody, requested a by-stander to assist in the execution of such process, and such by-stander did render such assistance, on the promise of such Justice to indemnify him against all damage therefrom, and it turned out that such process was void, whereby said by-stander was rendered liable in trespass to the party arrested, and was compelled to pay damages and costs, it was held that such by-stander could sustain no action on such promise of indemnity against said Justice.

THIS was a writ of error to the Common Pleas for this county. The action below was assumpsit on a special promise of indemnity. The declaration consisted of numerous counts, varying the statement of the promise. The first count averred that the defendant was a Justice of the Peace, and as such Justice did assume and pretend to have authority as such Justice legally to direct and command the arrest and detention of one William Razor, who was then present before him as such Justice; that said defendant, pretending to have such authority, did direct and command the plaintiff with others to arrest and detain in custody said William Razor; that the plaintiff and others under such command, and the belief that said defendant had such power and authority to issue said command, had there and then arrested the said William Razor; and that one John Razor then and there endeavored to rescue the said William from custody: whereupon the said defendant commanded the plaintiff to seize said John Razor, and prevent the rescue of said William; and thereupon, in consideration that the plaintiff would, at the special instance and request of said defendant, obey and perform said command, so issued, and seize and lay hold of said John Razor, and endeavor to prevent such rescue, the defendant undertook and promised the plaintiff to indemnify and save him harmless from any loss or damage for or by reason of the seizure and deten-

tion of said John Razor. The plaintiff further averred that, believing in the authority of said defendant to issue said command, and that the arrest of said William Razor was lawful, he did seize said John Razor, and prevent him from rescuing said William. The plaintiff then averred that defendant had no such authority, and that the arrest of said William was illegal, all of which was unknown to the plaintiff. The count then set out a suit by Razor against him—judgment and a payment therof as damages sustained by plaintiff in obeying said command.

Another count averred, that defendant was a Justice; that one Sherman was a constable, and pretended to have a *ca. sa.* issued by said defendant for the body of one William Razor, and that by virtue thereof, he, the said constable, had arrested the said William, and detained him in custody; and that one John Razor endeavored to rescue said William from the custody of said constable; whereupon the said constable commanded the plaintiff and others to aid him in preventing such rescue; and that the defendant, in consideration that plaintiff would so aid said constable in preventing said rescue, assumed and promised to indemnify plaintiff against all loss or damage. The count then avers that the constable had no such authority—ignorance of this fact on the part of the plaintiff, and damages sustained as in the other count.

Another count set forth that in consideration that the plaintiff had done the acts above stated, at the special instance and request of the defendant, that the defendant assumed and promised to indemnify him against all loss and damage sustained by reason of so having acted at the request of the defendant. Then followed the averments of want of authority in the Justice and constable, ignorance of that fact on part of the plaintiff, and the suit, judgment, and payment, as damages.

Another count laid the promise to have been made by defendant, if plaintiff would assist the constable in arresting the said William Razor, under a process which the constable pretended to have.

Another count averred that the defendant pretended to have the authority to direct the arrest of William Razor, and that the plaintiff, on a promise of indemnity, made by defendant, did aid in making said arrest. The other averments were the same as in the first count.

To this declaration there were interposed separate demurrers to each count. The Court below sustained the demurrers to all the counts, and rendered judgment thereon for the defendant. To reverse this judgment, the writ of error was prosecuted.

WHEELER for plaintiff. The declaration contains two classes of cases—one on an *executory*, and one on an *executed* consideration. As to the first class, he contended that there were exceptions to the rule, that no promise to indemnify one against an illegal act, could be valid. He insisted that where the plaintiff was ignorant of the illegal character of the act, the promise was good. *Espinasse N. P.* 91. *Chitty on Contracts* 503—678, *note* 2; *Bathurst N. P.* 136; 4 *A. Jur.* 274; 17 *T. R.* 144; 16 *Mass. Rep.* 334. The case most relied upon was that of *Fletcher* v. *Harcourt*, *Winch. Rep.* 48, cited in 1 *Bacon Abr.* 274; *Chitty on Contracts*, 503; 4 *A. Jur.* 258, 276. That case was this. If A bring B to a common inn, of which C is host, and affirms to C that he hath arrested B by virtue of a commission of rebellion, and in consideration that C will detain B for the night, promises to indemnify C,—*held* that action could be sustained on the premises.

As to second class, he claimed that a promise on an executed consideration did not come within the rule. One may indemnify himself against the consequences of a past illegal act. *Chitty on Contracts* 678, *note* 1; 14 *T. R.* 381; 4 *A. Jur.* 251. He instanced the case of bonds given for past cohabitation.

NASH, for defendant, claimed that it would be contrary to public policy to hold such a promise binding. It would impede public officers in the discharge of their duty, if those called upon to aid them, could legally insist upon a promise of indemnity before consenting to act. It was their duty to obey the call of a known officer, in the execution of process, the suppression of riots, &c. They may probably require the authority of the officer to call upon them for aid to be produced; and each must decide for himself as to its legality. If they refuse to render assistance, they are liable to punishment, provided the officer had legal authority to make the demand. If they do not call for the authority, it is their own fault. As to right to call for authority of officer, *vide* 9 *Coke* 66, *b; Mackally's case*, 13 *Mass. Rep.* 323; 1 *Hayward Rep.* 471; 10 *Wend. R.* 514; 2 *Iredell R.* 201; 2 *Hill R.* 87; 3 *Chitty G. Pr.* 358.

A contract to indemnify or pay one for doing his duty, for performing an act the law requires him to perform, is void. 1 *Leigh N. P.* 39; 2 *Burs. Rep.* 924; 2 *Camp. Rep.* 317; *Pick. Rep.* 72; 1 *B. & A.* 950; *Addison on Contracts*, 22; 1 *Caines Rep.* 104; 1 *Comyns Dig.* 326, (*F* 7); 12 *Ohio Rep.* 281. It was the duty of plaintiff to obey the call. *Swan Stat.* 241, § 53—244, § 68—856, 537, 541, § 25; 5 *Wheat. Rep.* 437.

A promise to indemnify one against an unlawful act, or the commission of a crime, is void. 2 *Evans' Poth. on Obl.* 2 *Comyns on Contr.* 59; *Hutt.* 56; *Bul. N. P.* 146. The act in this case was a *known unlawful* act, to commit an assault and battery.

The exceptions to this rule relate exclusively to disputes to a title to property. If two men claim title to same property, and one promises to indemnify another in assisting to enforce his right, the promise is binding, though, having no title, the act was a trespass. If the promisee *knows* the act is a trespass, then he cannot enforce it. 14 *Pick. Rep.* 174; 9 *Cowen Rep.* 154; *Stone* v. *Hooker*, 3 *Hill R.* 170; 2 *Johns. Cases* 54; 14 *T. R.* 381; 17 *do.* 142; *Ives* v. *Jones*, 3 *Iredell Rep.* 538.

The cases cited by Mr. Wheeler all come within this exception, save that of *Fletcher* v. *Harcourt.* This case differs from the present, and cannot be forced as an authority to support it. He, however, doubted the law of the case; and, by reference to 1 *Bacon Abr.* 274, it would be seen that the case was entitled to very little respect as an authority. Hobart, C. J., doubts, and finally acquiesces on the ground that, after verdict, it would be presumed that the arrest was legal. Most of the writers on Nisi Prius do not refer to the case at all—such as Selwin, Leigh, &c. The case is against the soundest legal principles, and at least should govern only in a case running on all fours with it.

As to the executed consideration, he contended that an *illegal* consideration could not be the basis of valid promise. No such case could be found. As to cases of past cohabitation, those were cases of *bonds*, which needed no *consideration* to support them. The Court only refuse to set them aside. But such a consideration will not support an assumpsit. *Addison on Contr.* 20; 4 *B. & A.* 650; 9 *M. & W.* 501.

Avery, J., said that the principles involved in the case were very important ones, and demanded much consideration before the Court could sustain this action. We would reserve the case for decision in Bank, if we did not think it was putting the defendant to more expense than he ought to be put to. As it is, we must affirm this judgment. No case can be found that goes as far as this case does; and we do not think that public policy would justify us in subjecting a public officer to such an action as this. If counsel wish to have the opinion of the whole Court, they can obtain it at its next term in Bank, on an application for a writ of error. We wish they would present the record for the allowance of such a writ.

SUPREME COURT OF OHIO: WASHINGTON COUNTY, APRIL TERM, 1848.
ERROR.

[BEFORE READ AND AVERY, JUSTICES.]

THE STATE OF OHIO *v.* TRUXTON LYON.

The owner of any boat or float, navigating any of the canals, &c. of this State, is personally liable for any penalty or forfeiture incurred by the captain or hands in navigating such boat or float.

Nor is any demand upon such owner necessary before suit can be brought against him.

The receipt by a collector of single tolls, after the defendant has become liable to pay double tolls, does not bar the right of the State to recover the balance of such double tolls.

A collector of canal tolls has no authority to release any penalty incurred by any person under the canal laws.

THE case below was an action of debt, to recover double tolls for one in employ of defendant, having navigated a float of his logs on the Muskingum Improvement, without first having paid the tolls therefor, and obtained a permit for so doing from the Collector at Point Harmar. The declaration averred the ownership of the float by defendant, the navigation of it by one Corey, without having first paid the toll and obtained a permit, and that the double tolls amounted to $109.38, and concluded by demanding payment of $54.69, the said defendant having paid the like sum, being single tolls—thus leaving only the penalty due to the State. To this declaration a demurrer was filed; and the Court below sustained the demurrer. To reverse this judgment, this writ of error was prosecuted.

NASH, for plaintiff, contended that the reception by the Collector of the tolls, did not release the right of the State to double tolls. The Collector has no authority to release a right once vested in the State. A public agent has no authority to release a right, unless specially empowered. 7 *Cranch Rep.* 366; *United States* v. *Lyman*, 1 *Mason Rep.* 432; *Martin* v. *United States*, 4 *Monr.* 487. In *qui tam* actions, the plaintiff has no authority or power to release the moiety belonging to the State without absolute payment. 9 *Pick. Rep.* 44; 9 *T. R.* 251; 11 *T. R.* R. 474; 1 *Bacon Abr. G.* 71.

GODDARD & WHITTLESEY, for defendant, contended that the declaration was insufficient, 1. Because it was against the *owner* instead of the person who had charge of the raft. The declaration shows that defendant did not navigate the float or raft. The owner ought

not to be liable for the neglect of his captains. 2. The action is brought for the penalty only. We contend that a receipt of the tolls without protest is a bar to the action for the penalty. It is like a case of damages on a protested bill. The receipt of the principal extinguishes the right to the damages. 5 *Greenlf.* 174; 13 *Wend.* 639; 15 *do.* 76; 1 *Metcf.* 156. The declaration adopts the receipt of the tolls by the Collector: hence his right to do so is admitted. 3. There is no averment of a demand. 4. There is no allegation of a forfeiture by the master.

Nash in reply stated, that the 120th section of the act decided the first objection by making every owner, part owner, and the boat, &c. severally liable for all penalties and forfeitures incurred by the master and hands in navigating the canals, &c. *Swan Stat.* 196. The forfeiture is then on the part of the owner as much as master. This shows that no demand is necessary.

Read, J. We think the declaration sufficient, and shall reverse this judgment. The statute renders the owner and boat or float severally liable for the acts of the master; and we think this must be an assignable liability, a liability to which the State has a right to resort in the first place; and the averments that the defendant owned the raft, and that it was navigated by the person in charge in such a manner as to incur a penalty, are sufficient to enable the State to sustain this action against the defendant. Nor do we think the second objection can be sustained. When the act had been done in violation of the statute, the right to demand double tolls became a vested one in the State; the defendant became indebted to the State in the sum of $109.38, and nothing but payment could cancel this indebtedness. The payment of single tolls could operate only as a payment of so much of the indebtedness. The Collector has no power to release the debts of the State: his business is to receive payments, not to release rights. Public agents have no powers except such as are expressly given them; and a power to receive cannot include a power to release. Neither do we think any demand is necessary. The duty of the defendant is to pay the tolls in advance; and failing to pay the tolls, he becomes liable, and is bound to pay double tolls. This duty exists as much before as after a demand.

SUPREME COURT OF OHIO: WASHINGTON COUNTY, APRIL TERM, 1848.

[BEFORE READ AND AVERY, JUSTICES.]

ROBINSON'S LESSEE *v.* NAHUM WARD.

A deed executed by executors under a power of sale, after reciting that the testator had been the owner of certain described tracts of land, conveyed said tracts of land, subject to all sales for taxes or otherwise, it being the meaning and intention of this conveyance to quit-claim all such right and title as the heirs of the testator had in and to said lands. It was held that such deed did not *purport* to convey lands, which the testator had conveyed in his life-time, and was not therefore such as would entitle the grantee under it to the benefit of the occupying claimant law against those claiming title under the testator himself.

Where one purchased wild lands, ignorant of a prior unrecorded deed, conveying a better title to another, but, before taking possession thereof, was informed of such deed, and yet took possession and made improvements, he will not be entitled to pay for such improvements under the statute for the benefit of occupying claimants.

To bring an occupant within the statute, both the title and possession must be obtained without fraud.

Taking possession after notice of a prior unrecorded deed, conveying a better title to another, is not a possession obtained without fraud.

THE case below was an application on the part of Ward for the benefit of the occupying claimant law, in a suit of *Robinson's Lessee* v. *Ward.* The bill of exceptions showed that Lebbeus Loomis was the owner of two shares of land in the Ohio Company's Purchase, and that in the year A. D. 1831, the said Loomis conveyed the premises in controversy, being a part of one of said shares, to one Wm. Trull, under whom the plaintiff in ejectment, by sundry mesne conveyances claimed. This deed was not recorded until Oct. 7, 1839.

The said N. Ward offered in evidence a deed from the executors of Lebbeus Loomis to himself for the said two shares of land, dated December, A. D. 1836, and recorded March 8th, 1837. This deed, after reciting that the said Lebbeus Loomis was the owner in his lifetime of two shares of land in the Ohio Company's Purchase, containing the following lots and parcels of land, to wit, setting out the lots by number, &c., conveys to said Ward all those lots or rights in the Ohio Company, subject to all sales for taxes, or *otherwise*—it being the meaning and intention by this conveyance to quit-claim all such right and title as the heirs of Loomis have in and to said shares.

The bill of exceptions further showed, that the plaintiff in ejectment proved, that at the time said Ward received the said conveyance, the premises were wild and unimproved lands, and that before

said Ward took possession of said premises, and made the improvements, payment for which was now claimed, he was informed by Douglas Putnam, that Loomis, in his life-time, had conveyed this tract to said William Trull, jr. and that the plaintiff's lessors were then the owners of the same.

The Court below decided that on this evidence Ward was entitled to payment for his improvements so made; and to reverse this judgment, this writ of certiorari was prosecuted.

Nash, for the plaintiff, claimed that the judgment must be reversed for two reasons:

1. That Ward had no such *title* evidenced by deed as the statute requires; because the deed from the executors of Loomis did not purport to convey the lot in controversy. The deed only conveys such right and title as the heirs of Loomis have in the two shares, subject also to all sales for taxes, or *otherwise.* Here the intention is plain, and that must govern. 19 *Pick. Rep.* 445; 15 *do.* 23; 1 *Mass. Rep.* 219; 4 *do.* 135; 6 *do.* 24; 7 *do.* 381; 16 *Pick. Rep.* 435. General words may be restricted by subsequent words. 13 *Maine Rep.* 430; *Thorndike* v. *Richards*, 14 *do.* 387; *Allen* v. *Allen*, 4 *Mass. Rep.* 196, 205.

2. That having received notice of the prior unrecorded deed to Trull, before he took possession, the taking possession after such knowledge, and making improvements, were a fraud upon the rights of plaintiff's lessors. To entitle him to improvements, he must have *obtained title to and possession of the premises, without any fraud or collusion on his part. Vide Swan's Statutes* 606. Here Ward took possession after he knew he had *no title.* This was obtaining the possession with fraud. *Vide Singleton* v. *Jackson*, 2 *Litt.* 208; *McKinley* v. *Halliday*, 10 *Yerg. R.* 477; 2 *U. S. Dig. Supb.* 276; 2 *U. S. Dig.* 726, § 356.

Goddard & Whittlesey, for defendant, contended, that the statute provided for cases of notice, "actual notice by the commencement of the suit." All improvements made prior to such notice may be allowed.

2. That there was no fraud here. Ward's deed was dated December 26, 1836, recorded 8th March, 1837. The land was vacant at the time, no one even paying the taxes. Ward did not at the time of his purchase know of plaintiff's title. He denied that the information given Ward by Putnam, was such as he was bound by. Was Ward to lie by and abandon the land on such information?

Avery, J. delivered the opinion of the Court—holding, that under the deed Ward got no *conveyance* of the land. The deed conveyed

to him only so much of the two shares as the heirs of Loomis had a right and title to. To this tract, the heirs of Loomis had no right or title, and of course the deed expressly excluded the tract from its operation.

As to the other point, the Court held, that possession taken, after notice of a better outstanding title in another, was not a possession obtained without fraud. The statute intended to provide payment for such improvements as were made in the honest belief that the occupant was improving his *own* land. Not only the title, but the possession must be obtained without fraud. Now, to take a deed of land with knowledge of title in another, would be too palpable a fraud to admit of doubt; and yet what would be fraud in obtaining the title must be equally so in obtaining the possession.

The Court reversed the judgment, and dismissed the application.

SUPERIOR COURT OF CINCINNATI: JUNE TERM, 1848.

Anonymous.

Held, that under the Act of February, 1848, to amend the Chancery Act, an injunction may be granted restraining the defendant in the suit at law, from any disposition of property in his own possession.

In Chancery. The bill alleged the indebtedness of the defendant to the petitioner; that a suit at law had been commenced by the petitioner against the defendant to recover the debt—naming the Court, setting forth the cause of action, and the amount due thereon, and alleging that the action at law was still pending. The bill also alleged that the defendant was the owner of, and had in his possession, certain personal property, and gave the facts, which it was claimed, justified the petitioner in the belief of the existence of the fourth cause named in the Act of 1848, (*Statute vol.* xlvi. *p.* 96,) setting forth that cause and alleging its existence. The bill prayed, among other things, for an injunction to restrain the defendant in the suit at law from any disposition of the property named, in his possession, inconsistent with the security of the petitioner, &c.

An injunction had been allowed until the further order of the Court, and the defendant moved to dissolve that injunction without answer, on the ground that the statute did not authorize the Court to enjoin the defendant in the suit at law from the disposition of his

property in his possession. The motion was argued for the defendant by Storer & Gwynne, who stated that the Commercial Court had so held; and by Coffin & Mitchell for the complainant.

Johnston, J. This is an application to dissolve an injunction, allowed under the Act of 1848, "to amend an act, directing the mode of proceeding in Chancery," passed March 14, 1831.

No answer has been put in by the defendants, and the only question raised by the motion is, whether, under this Act of 1848, property may be enjoined in the hands of the owner, pending a suit at law or equity against him, or whether it applies only to property in the hands of third persons.

The Act of 1831 provides this remedy, 1. against non-resident defendants; 2. against resident defendants, who shall have done any one of three things: 1. secretly departed out of the jurisdiction of the Court; 2. secreted himself; or 3. secreted his property *within* the jurisdiction, so that the process of law cannot reach either. In such case, if any person is indebted to such non-resident or secreting defendant,—or has in his possession goods, chattels, rights, credits, moneys, or effects, of such defendant, the plaintiff may file his petition and obtain his injunction.

The injunction provided for in this act extends only to third persons, and affects the property of the defendant in the original suit, in their hands only.

The Act of 1848 assigns five additional causes for this process, all new and unknown to the Act of 1831: 1. That the defendant is about to abscond from his usual place of abode; 2. that such defendant is removing, or about to remove, with his property or effects out of this State; 3. that such defendant is about to convey, assign, remove, conceal, or dispose of his property with intent to or so as to defraud, hinder or delay his creditors; 4. that such defendant fraudulently contracted the debt, or incurred the obligation upon which suit is brought; 5. that the debt or obligation upon which suit is brought was contracted by the defendant without the State, and that such defendant, with intent to defraud, hinder or delay his creditors, absconded from his former place of abode, or secretly removed his property from such State, with intent, &c.

But it is said these are only so many badges of fraud, which may authorize the Court to act under the fifteenth section of the Act of 1831, and that by the amendatory Act no new remedy is provided, nor is the old remedy extended so as to reach property in the hands of the owner.

This position, with great deference to a very ingenious argument, I think is not tenable. The second, third, and fifth causes assigned, are peculiarly applicable to property in the hands of the owner, and peculiarly *in*applicable to property in the hands of any body else.

That the defendant is removing, or about to remove, *with his property or effects*, out of this State, seems to be no good reason why an injunction should be laid upon a third person, to restrain him from an improper disposition of property not alleged to be in his hands.

That the defendant is about to convey, assign, remove, conceal, or dispose of *his* property with intent, or so as to defraud, hinder, or delay his creditors, seems to be no good reason why an injunction should be allowed against another person to restrain him from so disposing of property not charged to be in his hands.

That the debt or obligation upon which suit is brought, was contracted by the defendant without the State, and that the defendant, with intent to defraud, hinder, or delay his creditors, absconded from his former place of abode, or secretly removed his property from such State with that intent, seems to be no good reason why somebody else should be enjoined from improperly disposing of property, which, for aught that appears in the showing, he never had in his power.

All three of these assignable causes presuppose the property, which is the subject of the injunction, to be in the hands of the owner, and of course beyond the reach of an injunction upon a third person. The first and fourth of these causes are equally applicable to a case where the delinquent debtor has his property in his own hands, or placed for secrecy in the hands of another.

But let us read the residue of the first section: "The pendency of such a suit," (the original suit for the recovery of money or damages, in aid of which this proceeding is had,) "together with the existence of either of the causes above enumerated, shall entitle the plaintiff in such suit to file his bill against *the* defendant, his debtors, those having in their custody any of his property, money or effects, in the same way as is provided in the fifteenth section of the act to which this is an amendment."

The definite article *the* clearly refers to the defendant, against whom the claim exists; because, as yet, there is no other defendant brought into the act to whom it can refer. He is made the principal party defendant to the bill. All others come in after the

copulative *and.* They come in collaterally, as mere garnishees, or as persons implicated with the defendant in his purpose to wrong his creditors.

This view is strengthened by reading the third section:

"That the Supreme Court, or Court of Common Pleas, or any Judge of either of said Courts, on being satisfied by the oath of the petitioner, his agent or attorney, or by that and such other affidavits, as such Court or Judge may deem it reasonable to require, of the existence of either of the five causes above enumerated, may grant an injunction to restrain the defendant in such suit from any disposition of any property, credits or effects belonging to the defendant in the original proceedings, inconsistent with the secu ity of the petitioner, until the claim upon which the original suit was brought shall have been adjusted and satisfied, or until further order of the Court."

The definite article here again refers to the principal defendant, and, where it is necessary to make other defendants, to those also; and, although it is written in the singular, has a plural signification. It is to be understood as if written, "the defendant, or defendants in such suit." But the words, "defendant to the original suit," are used to show that the injunction affects his property alone.

There is still another reason for this view, growing out of the utter futility of restraining third persons from carrying off, or selling the defendant's property in fraud of his creditors, while he is left free to do the act himself.

The motion now pending is refused.

RECENT DECISIONS. SELECTIONS FROM 10 MISSOURI REPORTS.

Guaranty. Waine v. *Warllers* was never adopted in this State. Note, dated May 31, 1842, endorsed, "I hereby guaranty and secure the payment of the within note, this 13th day of August, 1842. G. W. N.," held good, though showing no consideration. *Little & Noecker* v. *Nabb*, 3.

Insurance—Deviation. 1. What constitutes a deviation depends on the character of the voyage and the usages of the trade. *Et passim vide* 1 *Phil.* 489; *Noble* v. *Kemoway*, *Doug.* 513; *Colum. Ins. Co.* v. *Catlett*, 12 *Wheat.* 386–7. 2. Evidence that it is usual for one boat to stop and assist another, when it is aground, is compe-

tent to show that such a stoppage is *not* a deviation. 3. In an action against the owners of a boat for a loss occasioned by the sinking of said boat, it is not necessary to show that the deviation was the cause of the loss. *Walsh* v. *Homer*, 6.

Warranty. There is no implied warranty of *good character* in the sale of a steer. *McCurdy* v. *McFarland*, 377.

Notice. A purchases land of B, and to defraud his creditors, has title made to C. D, without notice of fraud, acquires title under C. Before deed to D is recorded, the land is sold under execution against A, and the sheriff's deed is recorded. Held, that the deed of sheriff is no notice to D of fraud, as a registry of deed is only notice to an after purchaser *from the same grantor.* *Crockett & Risque* v. *Maguire*, 34.

Sales. A sale of materials to one owner of a steamboat is a sale to all, and all are liable, though a private understanding was, that each owner was to build a particular part of the boat. *Saltmarsh et al.* v. *Rowe & Vandeventer*, 38.

Sheriffs' Sales. There is no warranty, express or implied, to the the title or soundness of goods sold at sheriffs' sales. *Hensley* v. *Baker*, 157.

Statute of Frauds. A promise by B that he would pay a freight bill given to B, and by B transferred to C, in consideration that C would incur a liability for B, is upon a sufficient consideration, and need not be in writing. *Doane, Warburton & King* v. *Newman*, 69.

Garnishee. The answer of a garnishee that he had been indebted to A, but that prior to his being summoned, by an agreement between A, himself and B, a creditor of A, the money was to be paid to B, is evidence that he is not indebted to A. *Black* v. *Paul*, 103.

Mortgage. A having title to land, mortgages to B, and afterwards conveys to C. After sale to C, B enters satisfaction on his mortgage, and A conveys to him. Held, that the legal title vested in A, by the satisfaction of the mortgage, reverts and vests in C, the first purchaser. *White* v. *Todd*, 189.

Alteration of an Instrument. The altera[illegible]ritten instrument, without the consent of the obligor, renders it null and void.

2 *Bl. Com.* 208. Where a party, by altering a written instrument, renders it such that all legal remedy thereon is lost, he cannot by any other evidence establish the covenants therein contained. *Whitmer* v. *Frye*, 348.

Judgment. A judgment by attorney is not void, though the letter of attorney itself is void. When such a judgment has been revived by a *sci. fa.* against the administrator, it cannot afterwards be set aside, though the defect in the letter of attorney might have been pleaded in avoidance of the judgment, or given in evidence under the plea of *null tiel record* on the *scire facias*. *Ward & Co.* v. *Ellis' Admr.* 382.

Entries nunc pro tunc. A Court has power to order entries at proceedings had by the Court at a previous term, to be made *nunc pro tunc*. But when the Court omitted to make an order which it might or ought to have made, it cannot at a subsequent term be made *nunc pro tunc*. In all cases in which entries *nunc pro tunc* are made, the record should show the facts that authorize the entry. *Hyde* v. *Curling & Robertson*, 359.

Factor. A count charging a factor with not selling at *the best price*, is not sustained by proof of a delay in selling; the price obtained being the best to be had at the time of the sale. The delay in selling should be alleged as the ground of recovery. *Merle & Co.* v. *Haskell*, 406.

Deed. 1. A deed purporting to convey the real estate of the wife, in which the husband only joins as a party assenting to the conveyance by his wife, will not convey the interest of the husband in such real estate. *Ellenmann* v. *Thompson*, 587. 2. It is competent to show that money receipted on the face of a conveyance has never been in fact received; but it is not competent to show that a deed, purporting to be absolute, is only a mortgage. *Hagel* v. *Lindell*, 483.

License Law. Declared to be constitutional. *Austin* v. *State*, 591.

Witness. Though witness never saw party write, yet, if he has been in the habit of receiving letters purporting to be from the party, and which the party has acted upon, and recognized as his own, he may be permitted to testify as to the signature of the party. *Reyburn's Admr.* v. *Bellotti & Gugeri*, 597.

Indictment. Several persons may be indicted jointly for an offence which may be committed by several; and it is not necessary to allege that they are partners, as there can be no partnership in crime. *State* v. *Gay et al.*, 440.

Seduction. A mother cannot maintain an action for seduction of her daughter, where such seduction occurred during the life of the father, although the birth of the child occurred after the death of the father. *Vozsel* v. *Cole*, 643.

Motion. A motion is no part of a record until so made by a bill of exceptions. *United States* v. *Gamble & Bates* as *Garnishees, &c.*, 457.

Minors. 1. The law presumes that a minor is supplied with necessaries, so long as the minor resides with its parent. 2. A minor cannot become liable for necessaries, so long as it is supplied with necessaries by its parent. 3. If articles be furnished to a minor while it continues to reside with its parent, by a tradesman, it is at his peril: it is incumbent on him to show that they are necessaries or neither parent nor minor is liable. *Perrin* v. *Wilson & Wife*. 451.

Bankruptcy. Failure to give notice to a creditor will not vitiate a certificate of discharge by bankruptcy. *Shelton* v. *Pease*, 473.

Steamboats. 1. A judicial sale of a boat, to satisfy a lien of any class, conveys to the purchaser a title free from all liens of every class. *Steamboat Raritan* v. *I. G. Smith*, 527. 2. A barge is a boat, within the meaning of the words "boats and vessels used in navigating the waters of this State." *Barge Resort* v. *William Brooke*, 531. 3. Part owners of a Steamboat are not partners, but tenants in common. *Cinnamon* v. *Greenlee*, 578. 4. The lien given by our statute to certain claims against a Steamboat, does not extend to claims arising out of this State. *Steamboat Raritan* v. *Pollard*. 583. 5. In proceedings against Steamboats, the maritime law governs in the absence of statute. *Finney, Lee & Co.* v. *Steamboat Fayette*, 612.

Miscellaneous.

Non-performance of Contract. [Boston Court of Common Pleas. Scudder et al. *v.* Earle & Co. From the Boston Daily Advertiser.] This was an action on the case, brought for the non-performance of an alleged contract for the sale and delivery of one thousand barrels of flour.

At the time of the contract declared upon, the plaintiffs, Scudder & Co., were in New York city, and the defendants, Earle, Brown & Co., in the city of Boston. According to the testimony of Mr. John W. Sullivan, a broker in Boston, on the morning of the 7th May, 1847, Sullivan called at the counting-room of the defendants, Messrs. Earle, Brown & Co., and asked the prices of flour, and what they had for him to sell that day. He was informed by a member of the firm, that among other lots, they had 1,000 barrels of Michigan superfine flour for sale, "to arrive," at $6.75 per barrel, to be delivered in all the month of June, then next ensuing, cash on delivery. With this lot and others entrusted to him for sale, Sullivan went into the market to procure purchasers; but, before leaving their counting-room, he stated to the defendants, that he had no purchaser; that he should act as their agent, and should look to them for brokerage: to which they assented, by saying, that if he could sell at the prices named, they would pay him brokerage. About one o'clock of the same day, Mr. Sullivan received a telegraphic despatch from Scudder & Co. in New York, ordering him to buy 5,000 barrels flour; and, meeting the plaintiffs' clerk in State street, he requested him to communicate to Scudder & Co. what flour he had found, which was done in the following terms:

"Mr. H. Scudder. Sir—Have been able to find only 1,000 Michigan, in all June, 6.75. Reply immediately. J. W. S."

About 1½ o'clock, Mr. Sullivan met E. B. & Co. on 'Change, and informed them that there was a negotiation pending for the 1,000 barrels of flour, to which answer was made, "very well." About 5 o'clock, another telegraphic despatch was received by Mr. Sullivan from Scudder & Co. in New York, in these terms:

"For J. W. Sullivan, Boston. Sir—Purchase the flour. Harvey Scudder & Co., New York."

Upon the receipt of this last communication, Mr. Sullivan went to the store of the defendants, and, finding that they were out of town, left a memorandum for them, stating that a sale had been effected, not naming the vendees; and then proceeded to the counting-room of the plaintiffs, and left there a note in writing, as follows:

"Boston, May 7, '47. Messrs. Harvey Scudder & Co. Gents.—I have communicated to Messrs. Earle, Brown & Co. of our acceptance of their proposal to sell, through me, one thousand barrels of Michigan superfine flour, to be inspected as such by Geo. Wade, (unless previously inspected and satisfactory,) and in merchantable order, to be delivered here in all the month of June next, at 6.75 per bbl. cash on delivery. Respectfully,

"JOHN W. SULLIVAN."

On the morning of the 8th—the next day—Mr. Sullivan called at the store of the defendants, when they said they "did not think they ought to pay the brokerage;"

and some other words then occurred, which indicated that the defendants were not inclined to abide by the contract. Here the matter rested until the last day of June, 1847, when, according to the testimony of Mr. Morse, the clerk of the plaintiffs, the plaintiffs went to the counting-room of the defendants, reminded them of Mr. Sullivan's contract, expressed their readiness to receive the flour, made a demand for the delivery thereof, and tendered them in money $6,750, being the price for 1,000 barrels, at $6.75 per barrel. The defendants answered that they recognized no such contract, that they should not deliver the flour, nor receive the money tendered.

Upon this state of facts, as alleged, the plaintiffs' case rested—it being mutually agreed between the parties, that if the plaintiffs were entitled to recover upon their testimony, damages should be assessed at $250—the difference between the market and the contract price of the flour on the last day of June, when, according to the ruling of the Court, the contract, if any, was first broken by the demand and refusal aforesaid.

For the defence, it was contended, 1. that throughout this transaction, the defendants acted as agents, and not principals, and that as agents they were not liable to this action; 2. that Sullivan, the broker, was never authorized by the defendants to make the alleged contract; 3. that he, in fact, did act in pursuance of the telegraphic orders of the plaintiffs, and therefore that the memorandum left by him at the plaintiffs' counting-room, was the memorandum of the plaintiffs' agent, and thus could not bind the defendants; 4. that the memorandum made by Sullivan, and left with the plaintiffs, was not a binding and sufficient memorandum of the contract, within the statute of frauds; 5. that the demand of the plaintiffs, on the 30th day of June, was not legal, not being made at the proper time.

Bigelow, J., ruled, upon the first point, that the fact of agency was no defence, unless the principle was disclosed at the time the contract was made. Upon the fourth point, he ruled, that if the jury were satisfied as to Sullivan's authority, the memorandum made by him was sufficient and binding upon the defendants as their *memorandum*, and a good contract within the statute of frauds. He also ruled, upon the fifth point, that the demand was properly made. The case then went to the jury, mainly upon the question of Sullivan's authority to make the contract, and whether he in fact did act in pursuance of the defendants' directions to *sell* in the morning, or under the plaintiffs' telegraphic orders, in the afternoon, and as their *agent, to purchase.* The jury returned their verdict for the plaintiffs, and assessed damages in the sum of $250, with interest from the 30th June, 1847, being the sum fixed by the parties.

H. A. Scudder for the plaintiffs; Wm. Brigham for the defendants.

*Marvin's Legal Bibliography.** This is a well printed octavo volume of 800 pages. The author has diligently and laboriously explored all accessible sources of information, that he might furnish the profession with a complete catalogue of American and British Law Books, together with such Continental treatises as are most frequently referred to by our jurists. In the first instance, the *authors* are arranged alphabetically. This part of the work abounds with historical and critical observations upon the merits of the various works, or their different editions, some of them original, but the larger part selected from the best authorities, which are always

* "Legal Bibliography; or a Thesaurus of American, English, Irish, and Scotch Law Books, together with some Continental Treatises, interspersed with Critical Observations upon their various editions and authority; to which is prefixed a copious list of Abbreviations. By *J. G. Marvin*, Counsellor at Law. Philadelphia: T. & J. W. Johnson, Law Booksellers, No. 179 Chestnut Street. 1847."

given. Then follows a copious Index of *Subjects*, alphabetically arranged, with an enumeration of the books written upon each subject. To the whole is prefixed a list of *Abbreviations*, by far the most complete we have seen, of the titles of law books as cited by lawyers. It is obvious that such a book, if well executed, must be of great convenience to the profession, as supplying a want which every lawyer has often felt. That this book is well executed, it might seem hazardous to affirm, upon so hasty an examination as we have been able to bestow upon it. The chief merits would be accuracy and completeness. To test these with certainty, one must repeat the vast labor performed by Mr. Marvin in making the book. But there is a partial test, which each reader can apply for himself. Let him think of any rare work in any department of jurisprudence, and see if it is correctly described here, and repeat the experiment until he is satisfied. We have done this; and the result is what we expected from the high reputation of the author. In no instance have we detected an omission of a book, or an erroneous description of it; and therefore we express a strong belief in its accuracy and completeness. It is then indeed a "*Thesaurus*," or treasure of the lawyer, groping his way through ever increasing myriads of books, and needing a guide-book at every turn. W.

Kentucky Reports. We are sure we shall confer a favor upon the profession, by calling their attention to the republication of these Reports, by those enterprising publishers, Messrs. *H. W. Derby & Co.*, of Cincinnati. In point of extent, this is certainly the largest undertaking, in the way of law books, adventured upon this side of the mountains; and we think the assertion would be true as to any except school books. We quote the following from their advertisement:

The subscribers have commenced the publication of a new edition of the Kentucky Reports,—to be reprinted in full, without condensation or omission. They will be printed in the best style, and bound in a uniform and superior manner; and, with the exception of Bibb, which was printed in Kentucky, and purchased by the present publishers, furnished at one third less than the price of the first editions, which have been for some time out of print. The new edition will include—

Bibb's Reports, from 1808 to '17, 4 vols. at - -	$20—original price,			$20
A. K. Marshall's Reports, from 1817 to '21, 3 vols. at	10	"	"	15
Littell's do. from 1822 to '24, 5 vols at	20	"	"	25
Littell's Select Cases, 1795 to '21, 1 vol. at				5
T. B. Monroe's do. 1824 to '28, 7 vols. at - -	23	"	"	35
J. J. Marshall's do. 1829 to '32, 7 vols. at - -	23	"	"	35
Dana's do., from 1833 to '40, 9 vols. at - - -	30	"	"	45

Now published, and ready for delivery—Bibb's Reports, 4 vols.; A. K. Marshall's Reports, 3 vols.; Littell's Reports, 5 vols.; Littell's Select Cases, 1 vol.

The subsequent Reports, viz., T. B. Monroe's, J. J. Marshall's, and Dana's, will be printed as fast as the work can be performed.

We have before us the volumes already printed, and can bear testimony to the very superior style of their mechanical execution, compared with the original editions. These last, as we have had abundant reason to know, having repeatedly tried in vain to procure a complete set, have been some time out of print, with the exception of Bibb, which was republished in 1840. But were this fact otherwise, we should now be able to procure a far better edition at two thirds of the price—a very sufficient reason for congratulating the profession, overburdened as they are by the enormously high price of law books in general.

Of the merits of the Kentucky Reports, considered as authority, it would be superfluous at this day to speak. If they do not stand on a par with those of Massachusetts and New York, they come next to them; and here in the West, they have one peculiar recommendation, in this, that they contain the oldest judicial exposition of the Western law of real property, so different in many respects from that which pre-

vails in the Eastern States. So that while no American law library would be at all complete without them, they are almost indispensable to the Western lawyer.

We look upon this enterprise then as conferring a substantial boon upon the profession, and hope that the publishers may find, in the result of this experiment, encouragement to try it upon other dear and scarce books. The field for such experiments is as wide as the Union. W.

English Common Law and Equity Reports. We learn that Messrs. Little & Brown, of Boston, contemplate the publication of two series of Law and Equity Reports—the first commencing with the Year Books, and coming down to the Term Reports of Mr. East, and the second commencing with East's Reports, and coming down to the beginning of the present year. The number of volumes will be about twenty-four. Of the cost of each we are not informed, but presume that it will be about the same as that of their edition of Vesey's Reports. The editorial supervision devolves on J. C. Perkins, Esq., whose name is becoming to the lawyer as familiar as household words, and whose labors, judging from what he has already given to the profession, well deserve to be regarded as Herculean.

The publishers state, that this collection will embrace all the cases, decided in law or equity in the English Courts, that have *been cited*, or that may be supposed to have any practical value for citation or reference at the present time. They propose to publish them in chronological order, and to print *each case entire*, with notes and references to all subsequent English and American cases bearing upon it. This is a decided improvement upon the republication of Reports. Often have we been doomed to disappointment, when, on being referred to a case in point, we have found but a meagre skeleton of it, and often that the American Editor has—not in the exercise of a "sound discretion"—omitted the case entirely. We could easily name several works got up on this plan, but they are too familiar to the practising lawyer.

In fine, they say that the object of this enterprize is to furnish a complete series of all the decisions to which the profession may have any occasion to refer within the range of reports from which the selection is to be made, so that every lawyer may have all that is valuable in these reports within a reasonable compass, without being compelled to suffer the ruinous and unsatisfactory expense of purchasing the very large number of costly volumes from which these cases are to be collected. A project of this character cannot fail to receive the approbation and good wishes for its consummation from every professional man.

One volume of each series will probably be issued during the coming summer.

☞ *Insurance—Greenleaf on Evidence.* [It gives us great pleasure to insert the following explanation of an obscurity, suggested by our correspondent "H. F.," in Mr. Greenleaf's admirable work on Evidence.]

MESSRS. EDITORS: In the passage, in 2 *Greenlf. on Ev.* § 408, commented upon by "H. F.," in the last April number of your valuable Journal, a slight emendation of the text, expressive of what seems to have been intended by the author, will clear it from the objections of your correspondent. The author, in the passage cited, is speaking of *such* a subsequent increase of the risk "*as to render the policy void*"—not asserting that such increase of risk would, on general principles, avoid a policy, but alluding to an increase of risk *contrary to a condition in the policy.* The insertion of these last words will free the text from critical objection; though they are implied in the passage as it stands. The three cases cited immediately afterwards from Massachusetts decisions, are all of that character, turning upon the special contract of the parties: and so are those cited by your correspondent. The author of the work quoted may say with Horace—*Brevis esse laboro, obscurus fio.*

Married Women. [The following is the law which has passed both Houses of the New York Legislature, to protect married women in the enjoyment of their own property.]

§ 1. The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property.

§ 2. The real and personal property, and the rents, issues, and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted.

§ 3. It shall be lawful for any married female to receive by gift, grant, devise, or bequest, from any person other than her husband, and hold to her whole and separate use, as if she were a single female, real and personal property, and the rents, issues, and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.

§ 4. All contracts made between persons in contemplation of marriage, shall remain in full force after such marriage shall take place.

Rights of Assignees. A decision of some interest to commercial men and bankers, is reported in the N. Y. Journal of Commerce.

On the 29th June, 1846, cotton was shipped from Savannah to New York, for sale on commission. On the same day, a draft at sixty days was drawn by the shipper, and discounted for the holder by a third party; the shipper declaring it was drawn against, and payable from the proceeds of the shipment. The draft reached New York on the 6th of July, and was accepted. But, in the mean time, on the 30th of June, the commission merchant on whom it was drawn had failed, and made a general assignment for the benefit of all his creditors. The shipper also failed at or about the same time. The cotton arrived on the 9th of July, and was taken possession of by the asssignee. A bill in equity was filed, praying that the proceeds of the cotton might be applied to the payment of the draft. The bill was demurred to, but the Supreme Court, sitting in equity, gave judgment against the demurrer, holding that when the assignment was made, the assigner had no property in the cotton, the draft not being then accepted, and that afterwards, when the cotton arrived, he held it only as trustee for the holders of the draft. Of course his assignee took it subject to the same trust.

Generosity of the Philadelphia Bar. A case of extreme hardship was recently brought to the notice of Judge King. A young girl was convicted of the larceny of money under peculiar circumstances. Nearly two years since a boarder in her father's house missed a small sum of money out of his trunk, which she confessed to have taken under the supposition that it belonged to her father. The parents of the defendant had promised to restore the property, but were prevented most probably from doing so in consequence of their poverty. A short time since the girl was married to a respectable young man, when the prosecutor commenced proceedings against her. The mother of the girl was forced to appear against her in the performance of a sacred but painful duty, and it was most likely her testimony that influenced the jury in rendering a verdict of guilty.

Judge King said that he had reflected deeply upon the case, and had determined upon passing a nominal sentence, believing that the ends of public justice would be better satisfied than if the severity of the law were inflicted upon her. He then decreed that she pay a fine of one cent, restore the property, and undergo twenty-four

hours' imprisonment. A member of the bar arose and said that he was sure that his brethren around him would raise the money on the spot, if the Court would withhold its sentence for the present.

The sum was about $50, and the whole of it was in the space of about three minutes obtained—the officers of the Commonwealth throwing off their costs at the same time. After the money had been thus raised, the prosecutor stepped forward, and positively refused to touch a penny of the money, and desired that the utmost leniency be extended to the unfortunate prisoner.

Consignee—Charges—Power to sell. [Superior Court of New York—before Judges Oakley, Vanderpool and Sanford. Marfield *v.* Goodhue & Co.] From May to Aug. 1846, Mr. M. sent 2,716 barrels of pork from Chillicothe, Ohio, on consignment to Messrs. G. & Co., without any instructions, but with bill of lading. The freight, insurance, and other charges cost Messrs. G. & Co. about $5,000, one quarter the value of the pork. In December following, G. & Co. gave notice of an intention to sell; but Mr. Marfield, in a correspondence, stated his belief that the article would rise in value, and asked G. & Co. to withdraw the pork from market at present, and he could tell in 30 or 60 days in regard to it. Previous to December, Messrs. G. & Co. had paid, by request, and on account of Mr. M., to about 90 per cent. of the value of the pork. They replied to Mr. M. that they thought it best to proceed gradually to sell, and did so, at $9 and $9¼, to within $6,000 of their advances. This was between December and February. In the latter month the price rose to $12 per barrel, when Mr. gave them formal notice to sell. They having already sold as stated, he brought action to recover the difference, and paid cost and charges on what was left, and took it into his own possession. A verdict was taken subject to the opinion of the Court. It was contended for the plaintiff, that no instructions having been given, and no drafts drawn against the consignment, the owner did not lose the control of it, and the factor was bound to withdraw it from the market in December, as required. The Court gave an opinion at much length. It considers the reception of the bill of lading and the payment of freight and charges, to have been commensurate to a draft, and to create a lien, enabling the factor, with due regard to the interests of the shipper, to realize, to the amount of disbursements, and if farther advances have been made as here, to the amount of the advances in addition. If a shipper wishes to obtain control, or repossession of the goods consigned, he must satisfy the factor to the amount of his advances. *Judgment for defendant.*

Parent and Child—Right of Parent to recover damages, where Child is killed through negligence. [Court of Common Pleas of N. York—before Judge Ingraham. Bach *v.* City of New York.] To recover damages for injury while blasting rocks, corner of Fortieth street and Bloomingdale road, already referred to, in which the front of the house was stove in, the wife of plaintiff injured, and the eldest of his three children killed. The Court charged, that if the jury considered there was negligence on the part of the persons blasting the rocks, the plaintiff is entitled to recover actual damages, and also such additional amount as the jury may see fit to give. As to the death of the little boy, if the jury consider there was negligence, the plaintiff is entitled to recover a fair compensation for the loss of services till the child should have attained, if living, the age of 21. The jury returned a verdict in favor of plaintiff, for $250, thus finding that there had been negligence. In answer to a question of the Court, the foreman stated that no part of it was for loss of services of child, and it was so recorded.

Days of Grace—Sight Drafts. We learn from the New Orleans Bulletin, that the Third District Court of that city has decided that the same *grace* is to be allowed on *sight* bills as on *time* bills. A New Orleans banker drew a bill on a banker in New York, payable at sight. The drawers having failed after the bill was issued, and before it was presented, payment was refused and the bill was presented, and notice given on the first presentation. This was proven to be the usual course in New York on sight bills. The Court held the protest irregular, because the drawer is allowed three days after presentation to pay the bill. This decision is in opposition to the general usage, and will, probably, be revised.

New Rule in Supreme Court of Pennsylvania. By a rule of the Court, no counsel in the Eastern District is permitted to occupy *more* than an hour in the argument of any cause in the Court, unless with the special permission of the Court, and in such case only as may in their judgment imperatively require a relaxation of the rule. Counsel, if they think proper, are permitted to make such arrangement as that one counsel may occupy more than one hour of the allotted time, it being expressly understood that his colleague, if any he has, be restricted in his argument to the residue of the time. Where there is but one counsel for the plaintiff or defendant in error, he may be permitted to occupy two hours in the argument of the case.

Counsel are not at liberty to read any part of a report, except the syllabus of the case, unless desired by a member of the Court.

Examination of Attorneys. The tendency in too many of the profession to pervert this important duty into a mere farce. is well hit off in the following specimen of an examination ascribed to New York.

Examiner: Do you smoke, sir? Candidate: I do, sir. Examiner: Have you a spare cigar? Candidate: Yes, sir—(extending a short six.) Examiner: Now, sir, what is the first duty of the lawyer? Candidate: To collect fees. Examiner: Right! what is the second? Candidate: To increase the number of his clients. Examiner: When does your position toward your Client change? Candidate: When making up a bill of costs. Examiner: Explain! Candidate: We then occupy the antagonist position—I assume the character of plaintiff, and he becomes defendant. Examiner: A suit decided, how do you stand with the lawyer, conducting the other bill? Candidate: Cheek by jowl. Examiner: Enough, sir—you promise to be an ornament to the profession, and I wish you success. Now, are you aware of the duty you owe me? Candidate: Perfectly. Examiner: Describe the duty. Candidate: It is to invite you to drink. Examiner: But suppose I decline? Candidate—(scratching his head): There is no instance of the kind on record in the books. I cannot answer that question. Examiner: You are right; and the confidence in which you make the assertion shows that you have attentively read the law. We will go and take the drink; and then I will sign your certificate.